

**Date:** 20190109

**Files:** 566-02-5824 and 5826

**Citation:** 2019 FPSLREB 2

*Federal Public Sector  
Labour Relations and  
Employment Board Act and  
Federal Public Sector Labour  
Relations Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

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BETWEEN

**DIANE BROWN**

Grievor

and

**DEPUTY HEAD  
(Canada Border Services Agency)**

Respondent

Indexed as  
*Brown v. Deputy Head (Canada Border Services Agency)*

In the matter of individual grievances referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations and  
Employment Board

**For the Grievor:** Douglas Hill, Public Service Alliance of Canada

**For the Respondent:** Sean Kelly, counsel

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Heard at Vancouver, British Columbia, and Ottawa, Ontario,

**File:**  
December 12 and 13, 2017, and May 1, 2018.

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**REASONS FOR DECISION**

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**I. Individual grievances referred to adjudication**

**1** Diane Brown (“the grievor”) is employed by the Treasury Board (“TB” or “the employer”) at the Canada Border Services Agency (“the CBSA”) as a border services officer (BSO) in the general technical group, classified at the FB-03 group and level. At the time relevant to the events that led to the grievances, her position was located at the CBSA’s Beaver Creek, Yukon, Port of Entry (POE).

**2** On September 22, 2009, the grievor received discipline in the form of a three-shift suspension without pay (the equivalent of 25.71 hours) for the following:

- failure to contact management to inform of the arrest of a traveller;
- failure to arrest, detain, or frisk another, related traveller;
- allowing travellers under suspicion of transporting undeclared firearms to search their own vehicle;
- failure to ensure control was maintained over the firearms, the conveyance (vehicle), and all persons involved;
- failure to notify the arrested traveller of his rights under the *Vienna Convention on Consular Relations* (“the *Vienna Convention*”);
- failure to address the immigration inadmissibility of the travellers; and
- failure to complete an “E-67” form as per instructions previously emailed by her supervisor.

**3** On September 28, 2009, the grievor grieved the discipline. As corrective action, she requested that the three-shift suspension be rescinded, she be reimbursed all sick leave credits used during the investigation and disciplinary process, and she be made whole.

**4** The employer denied the grievance at the final level of the grievance process,

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*Federal Public Sector Labour Relations and Employment Board Act and  
Federal Public Sector Labour Relations Act*

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and the grievor referred it to the former Public Service Labour Relations Board (PSLRB) under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *PSLRA*”) (file no. 566-02-5824).

**5** On January 12, 2010, the grievor received discipline in the form of a four-shift suspension without pay (the equivalent of 34.28 hours) for smoking in the workplace. On January 14, 2010, she grieved the discipline. As corrective action, she requested that the four-shift suspension be rescinded, she be reimbursed all sick leave credits used during the investigation and disciplinary process, and she be made whole. The employer denied the grievance at the final level of the grievance process, and the grievor referred it to the PSLRB under s. 209(1)(b) of the *PSLRA* (file no. 566-02-5826).

**6** On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

**7** On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (“the Act”).

**8** At the outset of the hearing, the employer advised that it was withdrawing the contention in support of the discipline that the grievor failed to arrest, detain, or frisk a

related traveller.

**I. Summary of the evidence**

**9** The Beaver Creek POE is remote. It is located roughly 30 km south of the actual border between Canada and the United States of America between the state of Alaska and the Yukon Territory. The town of Beaver Creek is approximately 2 to 3 km south of it. It operates 24 hours a day, 7 days a week year-round and handles both private citizens and commercial traffic.

**10** The POE has two lanes for incoming traffic. One lane, the eastern-most, is the primary inspection lane (“PIL”) with a booth (which is attached to the entire building complex) on the east side (driver’s side) of the PIL. There is a second lane, immediately adjacent and to the west of the PIL, for commercial traffic; however, there is no separate booth for it. Across the highway is the Beaver Creek Airport, for which the POE is also responsible for any international air traffic.

**11** The POE building has an immigration interview room, a detention cell, an indoor search bay, and two outdoor inspection bays.

**12** The Royal Canadian Mounted Police (“RCMP”) has a detachment in the town of Beaver Creek.

**13** The grievor joined the CBSA’s predecessor in 1987 and was a customs inspector until the CBSA was formed, when she became a BSO. At the time relevant to the matters in this decision, she had 22 years of experience as either a customs inspector or a BSO.

**A. The August 4, 2009, incident (file no. 566-02-5824)**

**14** This incident involves the grievor’s conduct in dealing with United States citizens attempting to enter Canada without declaring the firearms in their possession.

**15** In August of 2009, Claire Girard was the superintendent responsible for the Beaver Creek POE and two other remote POEs, at Little Gold and Dawson, Yukon. She joined the CBSA in 2003 and was the Superintendent for those three POEs from

July 2008 to 2010, although during this period she was away on authorized leave from September of 2009 until September of 2010. As she was physically located at Beaver Creek, the Little Gold and Dawson POEs reported to her remotely. In August of 2009, nine BSOs reported to her at the Beaver Creek POE, all of whom, as well as Ms. Girard, lived in government housing in town in Beaver Creek.

**16** As the superintendent, Ms. Girard was responsible for all operations at all three POEs, including all human resources activities. This included all scheduling, leave requests, officer performance reviews (“PER”), investigations into officers’ conduct, and public complaints. She was responsible for authorizing arrests and searches, served as a subject matter expert on immigration for the North, provided guidance on policies and procedures, liaised with other governments, including that of the United States, and managed the physical resources of all three POEs. She reported to Chief Tammy Rathberger in Whitehorse, Yukon.

**17** Ms. Girard testified that before becoming a superintendent, she was a BSO. She stated that BSOs are responsible for enforcing approximately 90 Acts of Parliament, the key ones being the *Customs Act* (R.S.C., 1985, c. 1 (2<sup>nd</sup> Supp.)) and the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27; *IRPA*).

**18** The BSO work description was entered into evidence. In summary, a BSO conducts inspections and examinations to determine if goods are admissible and if people are authorized to enter Canada. BSOs have the authority to arrest and detain people, seize goods, and collect duties and taxes. They also provide facilitative services with respect to printing work and study permits, and they assist travellers. They must be familiar with the legislation they enforce and the policies and procedures that detail how they do their job.

**19** Two key activities of a BSO are making entry and release decisions. An entry decision refers to people, who can enter Canada by right (citizens or permanent residents), by law, or by authorized entry permitted by a BSO. A release decision refers to goods. If goods are released, they are authorized to enter the country; they are of a type that is permitted entry, which means that they are tax exempt, that the taxes have

been paid on them, or that permits have been issued for them.

**20** As of the hearing, Eric Armstrong was employed by the TB at the CBSA as a superintendent. He started his career with the CBSA in 2007 and initially worked at a container facility in Burnaby, British Columbia. In April of 2009, he moved to the Beaver Creek POE, where he was a BSO until July of 2011. He qualified as a superintendent in June of 2016 and is currently based at the Cascade POE in B.C. To avoid confusion in this decision I shall refer to him as BSO Armstrong when I refer to him when referencing things that occurred back in 2009, and Superintendent Armstrong when I refer to him giving evidence before me at the hearing.

**21** As of the hearing, Kristoffer Ruitenbeek was employed by the TB at the CBSA as the chief of operations for Northern Ontario. He started his career with the CBSA in 2001. From approximately Thanksgiving 2009 until just before Christmas 2010, he was a superintendent and was on assignment in the Yukon replacing Superintendent Girard, who was on leave. To avoid confusion in this decision I shall refer to him as Superintendent Ruitenbeek when I refer to him when referencing things that occurred back in 2009, and Chief Ruitenbeek when I refer to him giving evidence before me at the hearing.

### **1. Legislation, regulations, policies, and procedures relevant to this incident**

**22** The *IRPA* sets out the provisions for the entry of people into Canada. Its following sections are relevant to this matter:

. . .

#### ***Interpretation***

#### ***Definitions***

**2(1)** . . .

***foreign national*** means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person. (*étranger*)

***permanent resident*** means a person who has acquired permanent resident status and has not subsequently lost that

*status under section 46. (résident permanent)*

...

### **DIVISION 3**

#### **Entering and Remaining in Canada**

##### **Entering and Remaining**

##### **Examination by officer**

**18 (1)** *Subject to the regulations, every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.*

...

##### **Right of entry of citizens and Indians**

**19 (1)** *Every Canadian Citizen within the meaning of the Citizenship Act and every person registered as an Indian under the Indian Act has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen or registered Indian.*

##### **Right of entry of permanent residents**

**(2)** *An officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status.*

##### **Obligation on entry**

**20 (1)** *Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,*

**(a)** *to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and*

**(b)** *to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for*



*their stay.*

...

### **Temporary resident**

**22 (1)** *A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).*

...

### **Temporary resident permit**

**24 (1)** *A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.*

...

## **DIVISION 4**

### **Inadmissibility**

...

### **Criminality**

**36 (2)** *A foreign national is inadmissible on grounds of criminality for*

...

*(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.*

### **Application**

**(3)** *The following provisions govern subsection (1) and (2):*

*(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily . . . .*

...

## **DIVISION 5**

### **Loss of Status and Removal**

#### **Report on Inadmissibility**

##### **Preparation of report**

**44 (1)** *An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.*

##### **Referral or removal order**

**(2)** *If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.*

...

**23** At the time of the incident, the portions of the *Immigration and Refugee Protection Regulations* (SOR/2002-227; “the *IRP Regulations*”) relevant to this matter are as follows:

...

##### **Transborder crime**

**19** *For the purposes of paragraph 36(2)(d) of the Act, indictable offences under the following Acts of Parliament are prescribed:*

- (a)** *the Criminal Code;*
- (b)** *the Immigration and Refugee Protection Act;*
- (c)** *the Firearms Act;*

(d) *the Customs Act; and*

(e) *the Controlled Drugs and Substances Act.*

...

### ***Withdrawing application***

**42 (1)** *Subject to subsection (2), an officer who examines a foreign national who is seeking to enter Canada and who has indicated that they want to withdraw their application to enter Canada shall allow the foreign national to withdraw their application and leave Canada.*

### ***Exception — report***

**(2)** *If a report is being prepared or has been prepared under subsection 44(1) of the Act in respect of a foreign national who indicates that they want to withdraw their application to enter Canada, the officer shall not allow the foreign national to withdraw their application or leave Canada unless the Minister does not make a removal order or refer the report to the Immigration Division for an admissibility hearing.*

...

**24** The portion of the *Customs Act* relevant to this matter is as follows:

...

## ***PART VI***

### ***Enforcement***

...

### ***Prohibitions, Offences and Punishment***

#### ***General***

...

#### ***Smuggling***

**159** *Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament.*

25 At the time of the incident, the portions of the *Criminal Code* (R.S.C., 1985, c. C-46; “the CCC”) relevant to this matter are as follows:

...

***Export and Import Offences***

***Importing or exporting knowing it is unauthorized***

**103 (1)** Every person commits an offence who imports or exports

(a) a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or

(b) any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,

knowing that the person is not authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under an Act of Parliament.

...

**104 (1)** Every person commits an offence who imports or exports

(a) a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or

(b) any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,

otherwise than under the authority of the Firearms Act or any other Act of Parliament or any regulations made under an Act of Parliament.

...

26 The portions of the *Firearms Act* (S.C. 1995, c. 39) relevant to this matter are as follows:

...

***Authorization for non-residents who do not hold a***

**licence to import firearms that are not prohibited firearms**

**35 (1)** A non-resident who does not hold a licence may import a firearm that is not a prohibited firearm if, at the time of the importation,

**(a)** the non-resident

**(i)** is eighteen years old or older,

**(ii)** declares the firearm to a customs officer in the prescribed manner and, in the case of a declaration in writing, completes the prescribed form containing the prescribed information, and

**(iii)** in the case of a restricted firearm, produces an authorization to transport the restricted firearm; and

**(b)** a customs officer confirms in the prescribed manner the declaration referred to in subparagraph (a)(ii) and the authorization to transport referred to in subparagraph (a)(iii).

**Non-compliance**

**(2)** Where a firearm is declared at a customs office to a customs officer but the requirements of subparagraphs (1)(a)(ii) and (iii) are not complied with, the customs officer may authorize the firearm to be exported from that customs office or may detain the firearm and give the non-resident a reasonable time to comply with those requirements.

**Disposal of firearm**

**(3)** Where those requirements are not complied with within a reasonable time and the firearm is not exported, the firearm shall be disposed of in the prescribed manner.

...

**27** Entered into evidence were the following excerpts from the CBSA "Enforcement Manual":

- Part 2: Enforcement Priorities, Chapter 3, Firearms and Weapons;
- Part 3: Selection, Chapter 3, Reporting, Questioning, and Referral

Policy and Procedures;

- Part 4: Examination - Goods and Conveyances, Chapter 3, Personal Baggage, Goods, and Conveyance Examination Policy and Procedures; and
- Part 6: Searches and Enforcement Actions - Persons, Chapter 1, Arrest and Detention Policy and Procedures.

**28** Entered into evidence were the following excerpts from the “Immigration Enforcement Manual”:

- “Investigations and Arrests”;
- “2/OP 18 Evaluating Inadmissibility”;
- “Port of Entry Examinations”; and
- “Writing 44(1) Reports”.

**29** Ms. Girard testified that all BSOs would have seen the material in both manuals in their training. She said that copies are available on the CBSA’s intranet, which is accessible at the Beaver Creek POE, including on a computer in the PIL booth.

**30** The following are the relevant portions of the CBSA Enforcement Manual, Part 2, Enforcement Priorities, Chapter 3, Firearms and Weapons:

...

### ***AUTHORITIES***

Customs Act

...

9. *Section 159 stipulates that it is an offence to smuggle or attempt to smuggle any goods subject to duties, or any goods the importation of which is prohibited, controlled, or regulated by or pursuant to this or any other Act of Parliament.*

10. Section 160 stipulates that a person who contravenes specific provisions of the Customs Act, for example weapon smuggling, is guilty of an indictable offence and liable to a fine and/or imprisonment or an offence punishable by summary conviction and liable to a fine and/or imprisonment.

#### Customs Tariff

11. Section 136 stipulates that all goods enumerated or referred to in tariff item no. 9898.00.00 are prohibited entry into Canada. This includes firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms.

...

#### Criminal Code

18. Section 103(1) states that it is an offence to import or export without authorization a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm.

...

### **POLICY GUIDELINES**

23. Firearms and weapons are high-risk commodities and their interdiction is therefore a CBSA enforcement priority.

...

27. Seizure of any undeclared firearm is warranted when the traveller was given the opportunity to declare the firearm by completing a declaration card or by responding to questioning, and did not declare it.

...

### **ROLES AND RESPONSIBILITIES**

#### **CBSA Officers**

45. CBSA officers are responsible for:

- a) questioning travellers about firearms and weapons;
- b) observing, targeting, selecting, and examining conveyances, baggage, goods, and commercial shipments for firearms and weapons when reported to the CBSA;
- c) detecting and intercepting prescribed materials or devices, such as explosives or firearms and prevent their importation into or transit through Canada;

...

- e) arresting persons attempting to smuggle weapons or firearms into or out of Canada, in accordance with Section 495 of the Criminal Code;

...

- k) collecting and submitting information and evidence for prosecution and providing it to investigations/police.

#### **CBSA Superintendents**

46. CBSA Superintendents are responsible for:

...

- b) providing necessary assistance and support to CBSA officers . . . .

...

**31** The following are the relevant portions of the CBSA Customs Enforcement Manual, Part 4, Examination - Goods and Conveyances, Chapter 3, Personal Baggage, Goods, and Conveyance Examination, Policy and Procedures:

#### **POLICY STATEMENT**

1. It is the policy of the Canada Border Services Agency (CBSA) to physically examine personal baggage, conveyances, and goods upon arrival in and departure from Canada when deemed necessary.

...



**Conduct**

...

29. All examinations will be conducted in a thorough, methodical, and proficient manner.

**Health and Safety**

30. When conducting examinations, officers will take measures to protect the health and safety of fellow officers, the public and themselves.

...

**General**

...

40. Persons will normally be allowed to view examinations of their baggage, goods, and conveyance but will be kept at a safe distance to avoid any intentional or incidental interference.

...

**Intensive Examinations**

75. Officers will conduct systematic and intensive examinations of personal baggage, conveyances, and goods when they are the subject of a lookout or a target, or where the reasonable grounds to suspect a contravention is occurring is based on a number of indicators.

...

**ROLES AND RESPONSIBILITIES**

**Customs Officers**

92. Customs officers are responsible for:

- a) adhering to this policy and procedures . . . .

...

**Customs Port of Entry Managers and Superintendents**

93. *Customs port of entry managers and superintendents are responsible for:*

- a) *ensuring that the policy and procedures relative to the examination of personal baggage, goods, and conveyances are adhered to at their office;*
- b) *providing direction and support to customs officers; and*
- c) *taking appropriate corrective action on policy and procedure breaches.*

...

## **PROCEDURES**

### **General**

...

99. *Conduct a thorough, methodical, and proficient examination of any baggage, goods, and conveyance based on the level of intensity dictated by the referral and indicators.*

...

109. *Immediately and discreetly take steps to ensure control is maintained over the goods, conveyance, and any persons involved, and alert the superintendent if you suspect or discover the presence of illicit contraband or that some other serious infraction is being committed.*

110. *If officers discover illicit contraband commodities, they will immediately arrest, advise, and caution any suspect(s) that are present.*

...

111. *Remove any involved persons from the area when illicit contraband is found, a conveyance seized, or a person is placed under arrest.*

...

**32** The following are the relevant portions of the CBSA Customs Enforcement Manual, Part 3, Selection, Chapter 3, Reporting, Questioning, and Referral Policy

and Procedures:

...

### **POLICY GUIDELINES**

...

#### **Referrals**

...

41. *When persons are referred from primary, it is imperative that the primary officer conveys the information about the person's declaration and the reason for referral to the secondary officer. A declaration card or referral slip must be completed containing the following information:*
- a) *the number of persons questioned and their country of residence;*
  - b) *the dollar value(s) of the goods reported;*
  - c) *an approved referral code, which indicates the reason(s) for the referral and/or the suspicions of the officer; and*
  - d) *the initials, badge number, or lane of the primary officer.*

...

### **ROLES AND RESPONSIBILITIES**

#### **Border Services Officers (BSO)**

62. *BSOs are responsible for adhering to all reporting, questioning, and referral policies and procedures.*

#### **CBSA Port of Entry Managers and Superintendents**

63. *CBSA port of entry managers and superintendents are responsible for:*
- a) *ensuring that the policies and procedures relative to reporting, questioning, and referral are adhered to at their port;*
  - b) *providing direction and support to BSOs; and*

- c) *taking appropriate corrective action on policy and procedures breaches.*

...

**33** The following are the relevant portions of the CBSA Enforcement Manual, Part 6, Searches and Enforcement Actions - Persons, Chapter 1, Arrest and Detention Policy and Procedures:

...

**POLICY GUIDELINES**

**General**

- 19. *Except in exigent circumstances, officers will notify their superintendent of an arrest or detention as soon as possible.*

...

**Arrest**

- 25. *Officers will make an arrest, subject to restrictions in 495(2) of the Criminal Code, in situations concerning serious infractions of the law and where the criteria found in the CBSA Prosecution Policy are met. These include offences involving:*

...

- b) *firearms . . . .*

...

**Arrest of Foreign Nationals**

- 39. *Officers will inform arrested persons identified as being a foreign national (a person who is not a Canadian citizen including a stateless person) of their entitlement to contact the embassy or consulate officials of their home country once all arrest formalities have been completed.*
- 40. *Officers will allow arrested foreign nationals to contact the embassy or consulate officials of their home country. This is in addition to being allowed to contact counsel.*

...

41. Officers will notify Citizenship and Immigration Canada (CIC) as soon as possible after the arrest of a foreign national, including foreign nationals temporarily residing in Canada (e.g. work or student visas, Minister's Permit).

...

## **ROLES AND RESPONSIBILITIES**

### **Border Services Officers**

71. Border Services Officers (BSO) are responsible for:

...

- c. notifying the superintendent as soon as possible when an arrest has occurred . . . .

...

### **CBSA Superintendent**

72. CBSA superintendents are responsible for:

- a) ensuring adherence with these policies and procedures;
- b) evaluating the reasonable grounds as presented by an officer and where warranted authorizing the use of urinalysis or monitored bowel movements; and
- c) taking appropriate corrective action on any breaches of this policy.

...

### **Arrest of Foreign Nationals**

92. Determine if in fact the person being arrested is a foreign national, in other words, a citizen of another country.
93. After arresting, advising of their right to contact counsel, and cautioning against making statements, advise foreign nationals that in addition to their right to contact counsel they are also entitled to contact the embassy or consulate of their home country. Foreign nationals may contact their embassy or consulate and counsel while

*under detention as well.*

...

94. *Allow the person to contact the embassy or consulate of their home country if they wish to.*

*Note: The embassy or consulate officials contacted will ensure that the arrested person's rights under Canadian law are protected and will, if requested, notify the person's family of the arrest. While embassy or consulate officials may assist the person in obtaining legal counsel, they will not, as a matter of course, make any arrangements for the person's release.*

...

96. *Notify Citizenship and Immigration Canada (CIC) as soon as possible of the arrest of any foreign national.*

...

**34** The following are the relevant portions of the Immigration Enforcement Manual, on investigations and arrests:

***ENF 7 Investigations and Arrests***

***Distribution limited to CIC and the CBSA***

***17 Procedure: Making an arrest***

...

*In order to effect a valid arrest under the Act, the arresting officer must take the following steps:*

...

- *inform the person of their right to contact their embassy or a representative in their country's consulate in accordance with their rights under the Vienna Convention [IMM 0689B], see section 17.3 . . . .*

...

***17.1. Entering a Notice of Arrest in FOSS***

*The IMM 1285B, Notice of Arrest (NOA), is a document*

*which formally records the arrest and the reasons for the arrest of a person under the Immigration and Refugee Protection Act. After any arrest has been made under A55(1) or A55(2), an NOA must be entered immediately into the FOSS/NCMS database. The purpose of the NOA is to maintain accurate details of arrests made under IRPA such as the arrest time, date, place, reasons, grounds and arresting officer. . . .*

. . .

### **17.3 Notice of Rights conferred by the Vienna Convention**

*Under the Notice of Rights conferred by the Vienna Convention, persons arrested or detained under the Immigration and Refugee Protection Act have the right to have the nearest representative of the government of their country of nationality informed of the arrest and detention.*

*Form IMM 0689B serves to advise and record the Notice of Rights conferred under the Vienna Convention, as well as the exercise of those rights.*

. . .

*It is important that an officer take the time to explain what is happening to the person in a manner that they fully understand. The officer must use terms that the person understands to explain the violations under the Act. If language is a barrier, an officer must take the person to the nearest CBSA office and find an interpreter if one is not immediately available.*

*If the arrested or detained person wishes to have their government informed of their arrest and detention, the IMM 0689B should reflect this decision. The officer must inform their government representative, unless the person indicates a desire to contact their representative on their own initiative or informs the officer that their government representative need not be advised.*

. . .

**35** The *Vienna Convention* is an international treaty that addresses certain aspects of diplomatic relations between independent nations. Both Canada and the United States are signatories. A copy of it was entered into evidence. Its article 36

provides for consular communication and contact when the detention, arrest, imprisonment, or custody pending trial of a national of a sending state within a receiving state is involved, which in this case was a United States citizen in Canada.

**36** The following are the relevant portions of the Immigration Enforcement Manual, on evaluating inadmissibility:

...

### **3 Departmental policy on criminality**

...

#### **3.13 Policy intent**

...

*In keeping with Canada's continuing efforts to protect Canadian society and to prevent criminals from accessing Canada, paragraph A36(2)(d) is intended to enhance the ability of officers at a port of entry (POE) to efficiently remove foreign nationals where the commission of an offence occurs at the POE, regardless of a local policing authority decision or practice not to lay charges.*

...

#### **3.14 Policy application**

*The practical application and intent of paragraph A36(2)(d) is to bar entry into Canada of foreign nationals who commit offences in Canada, specifically at our borders. Officers are expected to use good judgment in applying the provisions of paragraph A36(2)(d).*

...

**37** Superintendent Girard testified that the purpose of the *Vienna Convention* and its application as set out in section 17.3 of the Immigration Enforcement Manual is to permit a foreign national who is being arrested or detained at the border to have the nearest representative of his or her country's government informed of the arrest or detention.

**38** The "Value and Ethics Code for the Public Service" ("V&E Code") (as it *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*



was named at the time) sets out the values and ethics that guide and support public servants in all their professional activities. It also sets out conflict-of-interest and post-employment measures. A copy of it was entered into evidence.

**39** A BSO completes an E-67 form when people entering Canada are referred from the PIL to secondary inspection. Its purpose is for the BSO in the PIL to alert the secondary BSO as to the reason for the referral. A blank one was entered into evidence.

**a. August 4, 2009**

**40** Entered into evidence were two written reports of the incident, both dated August 5, 2009, and completed by the grievor (“the grievor’s report”) and BSO Armstrong.

**41** On that day, Superintendent Girard was away from the Beaver Creek POE and was either at, travelling to, or returning from the Little Gold and Dawson POEs. To reach those other two POEs, she would have left Canada and travelled north through Alaska, as that is a shorter and more direct route. She stated that she travelled with both a mobile phone and a satellite phone, and while at the Little Gold and Dawson POEs, she could have been reached by a landline. She further stated that if she could not have been reached, her backup was the on-duty superintendent in Whitehorse.

**42** The grievor was working alone during the early afternoon when at approximately 1:20 p.m., a rented five-ton cube truck (“the 5-ton”) driven by Mr. A, a United States citizen, pulled up to the PIL. His spouse (“Mrs. A”), also a United States citizen, was in their personal vehicle directly behind the 5-ton, with their son. They were moving from Alaska to one of the lower 48 states, as Mr. A was starting a new job, and they were driving through Canada to get there. The 5-ton contained their personal possessions.

**43** The grievor asked Mr. A whether he had any firearms with him. He replied that he did not. However, she said that his demeanour made her suspicious. She stated that she asked Mr. A if he had ever owned firearms, to which he answered that he did

own a handgun and that he had left it with a son in Alaska.

**44** The evidence disclosed that the grievor asked Mr. A to pull the 5-ton forward into the right lane and to remain there while she spoke to Mrs. A. The grievor asked Mrs. A if she was carrying or transporting any firearms or other weapons. Mrs. A replied that she was not. When she was asked if she or her husband had ever owned or possessed any firearms or other weapons in Alaska, Mrs. A said that they had. When she was asked what type of firearms they were and where they were, Mrs. A told the grievor that both she and her husband each owned a pistol and that they had left them with her brother.

**45** The evidence disclosed that after she was done speaking with Mrs. A, the grievor had her pull up the vehicle she was driving behind the 5-ton and remain in it. The grievor testified that she continued questioning Mr. and Mrs. A about the firearms' whereabouts; she believed that they were not being honest and suspected that the firearms might be in the vehicles.

**46** According to the grievor's report, she left both Mr. and Mrs. A alone in their respective vehicles and returned to the POE building. She contacted Constable Jean-Luc Bedard of the RCMP, told him of her suspicions, and requested his assistance. Her report also indicated that she contacted BSO Armstrong and requested that he report to work early. She testified that while she waited for them to arrive, she went to clear the backed-up traffic.

**47** According to the evidence, Cst. Bedard arrived before BSO Armstrong, who arrived at about 1:50 to 1:55 p.m. Cst. Bedard did not testify; nor was any report that he might have authored entered into evidence. In both the grievor's report and her testimony, she stated that while she was clearing backed-up traffic, Cst. Bedard entered the POE office and told her that Mr. A had confessed to him that the pistols were in the back of the 5-ton.

**48** The grievor testified that after she learned Cst. Bedard's information, she called BSO Armstrong to ask him to come in to work early to assist because she could not keep up with the traffic flow.

**49** The grievor then testified that after calling BSO Armstrong, she and Cst. Bedard went to the 5-ton, and Mr. A confirmed to her that he had the firearms with him. She said that she arrested him, read him his rights, brought him into the lobby of the POE building where she frisked him, and had him take a seat in the lobby. She said that at this point he was upset; he stated that he had screwed up and that he would lose his job. The grievor said that in an effort to calm him, she explained the process to him. She said that she then left him in the lobby and went outside to bring Mrs. A and their son inside.

**50** BSO Armstrong's report indicates that when BSO Armstrong arrived, the grievor advised him that she had arrested Mr. A after he had admitted to having two undeclared pistols in the 5-ton.

**51** The grievor testified that after BSO Armstrong arrived, the two of them and Mr. A went to the 5-ton. Mr. A opened the back, which was packed full with household goods. She said that she asked Mr. A where the firearms were located, and he told them that one was somewhere in the middle and the other closer to the front. She said that she asked Mr. A to unload the 5-ton but told him that when he located the firearms not to touch them but to come get her. She said that Mrs. A helped him unload. She said that once this was underway, BSO Armstrong went to the PIL to process backed-up traffic, and she went into the building to do paperwork.

**52** When the grievor was questioned as to whether she asked Mr. A about ammunition, she first said that she did not ask him. However, she then stated she could not be certain.

**53** The grievor said that she assessed Mr. A as a low risk as he was compliant with her commands and did not display aggression either verbally or through his body language.

**54** The grievor said that by about 2:30 p.m., Mr. A had located the first firearm, which was a loaded 9 mm pistol. She said that BSO Armstrong went into the 5-

ton and retrieved it. After securing it, the grievor and BSO Armstrong permitted Mr. and Mrs. A to continue to unload the 5-ton and search for the second firearm. Once it was located, Mr. A again alerted the grievor, and once again, BSO Armstrong retrieved it.

**55** Once the CBSA possessed both firearms, the grievor stated that she advised Mr. A that he would not get them back and that the 5-ton was under seizure, subject to a \$2000 penalty. She said that at this point, he became emotional and told her that he could not pay the \$2000 and that he would be short some money. She said that he showed her a contract he had for a job. At that point, she told him that the penalty could be reduced, based on his full cooperation. She reduced it to \$1000.

**56** The grievor said once Mr. A paid the \$1000, she told him that he and his wife could reload the 5-ton and that they were free to go on their way. She stated that in her mind, she had no reason to detain Mr. A as she had run all the necessary checks, and he had no criminal history. She said she had no concerns about his criminal history or his admissibility, so he was free to go.

**57** When the grievor was asked why she did not arrest Mrs. A, she said that there was no contraband in the vehicle Mrs. A was driving. There is no evidence that anyone searched that vehicle.

**58** The grievor was asked if BSO Armstrong had advised her that Superintendent Girard had come through the POE, to which she answered, "Yes." When asked when that happened, she stated that it was midway through the first seizure but before the second firearm had been located. She said that her recollection was that BSO Armstrong told her that Superintendent Girard had come through the PIL and that he had told her what was going on.

**59** The oral evidence of both superintendents, Girard and Armstrong, was that Superintendent Girard returned to Canada that afternoon through the Beaver Creek POE sometime after 5:00 p.m. Superintendent Armstrong said that he was working the PIL when she came through and that they interacted for approximately one minute. His evidence was that he advised her that they had made a firearm seizure and that they were in the middle of an enforcement action.

**60** Superintendent Armstrong said that when Superintendent Girard came through the POE, the 5-ton was still parked there. In cross-examination, he said that he could not recall if the possessions of Mr. and Mrs. A were outside the 5-ton or if they had been repacked.

**61** In her evidence, Superintendent Girard stated that when she crossed the border, Superintendent Armstrong advised her about the seizure of the two firearms. In cross-examination, she stated that she did not recall the 5-ton being parked at the POE.

**62** There was no evidence or suggestion that Superintendent Girard left her vehicle, entered the Beaver Creek POE office, and spoke with the grievor.

**63** Neither in his report nor in his evidence before me did Superintendent Armstrong say that he told Superintendent Girard about anyone being arrested or about the particulars of what was going on.

**64** At 9:24 p.m. (local time), the grievor sent the following report, identified as a “flash report”, to a number of different employees, including Superintendent Girard, Chief Rathberger, and all employees at the Beaver Creek POE, which stated as follows:

*2 semi automatic [sic] pistols seized from a U.S. citizen. Subject was moving to [location omitted] and was driving a 5 ton [company name omitted] truck with all his household goods. Subject was followed by his wife who was driving a Chevy Suburban. Both subjects declared that they did not have or possess any firearms with them. I questioned both subjects in regards to whether they ever owned or possessed firearms while they were living in Alaska. Both subjects stated that they each had owned a pistol in Alaska. Inconsistencies and conflicting statements between the subjects led me to believe there were possibly undeclared firearms on board. Examination resulted in the discovery of one Smith & Wesson .9mm pistol which had a loaded magazine and one .22 Jennings pistol (unloaded)*

**b. Post-August 4, 2009**

**65** The grievor’s report states in part as follows:

...

*I went outside to the [brand name omitted] vehicle and requested that [Mr. A] step out of the vehicle. Subject complied. I placed [Mr. A] under arrest for smuggling firearms. I read the rights to contact council to [Mr. A] and asked him if he understood. [Mr. A] replied yes. I asked [Mr. A] if he wanted to contact a lawyer, in which he replied that he didn't think so. I proceeded to read to [Mr. A] the cautionary warning about making any statements. I asked the subject if he understood, in which he replied yes. I proceeded to explain to the subject that his firearms and his vehicle was now under Customs seizure and that his firearms would not be offered for release and that if only two handguns were found, that there would be a penalty assessment of \$2000.00 placed against his vehicle. The subject became emotionally upset and stated that his life was ruined, that he would lose his job, and that he did not have adequate funds to cover the penalty and to allow for other expenses such as fuel, hotels and food for him and his wife to travel down to [location omitted] for his move. I advised the subject to calm down and again explained the procedures to him. I advised the subject that there might be a possibility that the penalty could be reduced, but that he would have to wait to see what transpired during the vehicle examinations.*

*Border Service Officer Eric Armstrong and myself proceeded with the subject [Mr. A] to the [brand name omitted] vehicle and requested that the subject show us where he had hidden the handguns. The subject stated that the handguns were located approximately half way in the middle of the [brand name omitted] vehicle. This [brand name omitted] vehicle was found to contain a full load of household goods. Upon conversing with myself and Border Service Officer Eric Armstrong, it was decided amongst ourselves that the subject displayed little risk and it was decided to allow the subject to unpack and locate the plastic tote that the subject said contained his firearm. I advised the subject to not remove the firearm from the plastic tote, rather to locate the tote and come into the office to advise us when he did so and that we would remove the firearm from its location.*

*At approximately 1430 the subject comes into the office to advise me that he had located the firearm. BSO Eric Armstrong and myself went back to the [brand name omitted]. The subject showed us where the pistol was located. BSO Eric Armstrong proceeded to climb up several boxes and located a plastic tote and retrieved a firearm which was held in a holster. BSO Eric Armstrong handed me*

*the firearm, in which I made the firearm safe. This firearm was found to have a loaded clip.*

*BSO Eric Armstrong and myself conversed with the subject in regards to the location of the other pistol. The subject and his wife stated that they did not know exactly where this pistol was. The wife stated that she had last seen it in a grey cardboard file folder that might be packed within her craft supplies. I advised the subject to keep looking for the .22 pistol and again to advise me when he located it. BSO Eric Armstrong and myself assisted the subject with the search for approximately one half hour to no avail. Subject continued searching contents with the assistance of his wife.*

*At approximately 1700 hours the subject comes into the office and advises BSO Eric Armstrong and myself that he had located the .22 pistol. BSO Eric Armstrong and myself went back out to the [brand name omitted] and retrieved the .22 pistol which was found in a grey cardboard file folder.*

*I told the subject that he could repack his vehicle while I completed the paperwork for the seizure. The subject then began conversing with me in regards to his job, financial situation etc. During these discussions, the subject showed me a active job offer with a [information omitted]. This contract stated that the subject had to report to work by [information omitted]. The subject again reiterated that he did not think that he had sufficient funds to cover penalties and his move.*

*I advised the subject that I would see what I could do, as the subject had been very cooperative etc.*

*I completed all paperwork and decided that a reduction in the penalty assessment was justifiable due to H& C grounds, limited funds, the subject being cooperative, the Jennings .22 pistol being broken and unoperatable etc. Subject paid penalty of \$1000 with his Visa card.*

*INDECES checks were all negative for [Mr. A] and [Mrs. A].*

*At approximately 1900 hours, the subject had repacked his [brand name omitted] and departed Customs premises to continue his travel to [state name omitted].*

...

[Sic throughout]

**66** Superintendent Girard stated that she became aware of more of the details of the incident when she received an inquiry from Chief Rathberger about why the seizure penalty had been reduced to \$1000. She said that at this time, she became aware of irregularities in what had transpired, namely, that the Investigation Division had not been notified; nor did it appear that Mr. A's inadmissibility into Canada had been dealt with.

**67** Superintendent Girard testified that when someone attempts to smuggle weapons into Canada, he or she commits an offence at the border under the *CCC*, the *Customs Act*, and the *Firearms Act*. Standard processes and procedures must take place as set out in the customs and immigration enforcement manuals. With respect to searching vehicles, she stated that the procedures set out in the Customs Enforcement Manual provide for the following:

- a BSO will carry out the search;
- the person whose vehicle is being searched will be allowed to view the search, albeit from a safe distance, so that he or she cannot interfere, grab something, hide something, or hurt the BSO; and
- that person is not to touch or interfere with anything during the search.

**68** Superintendent Girard said that the rules for searching vehicles are in place to ensure the safety of the BSOs and the travelling public and to preserve evidence.

**69** When those who are not Canadian citizens commit a criminal act while attempting to enter the country, they are inadmissible and must be dealt with. If they are arrested, they have rights, which include being advised of their rights under the *Vienna Convention*. Mr. A is a United States citizen, and the grievor arrested him for smuggling weapons into Canada. Superintendent Girard stated that the grievor failed to properly process Mr. A once the arrest happened. Despite arresting him, the grievor merely released him once he paid the \$1000 penalty, which she could not do. After she arrested him, she had a number of options available to her, none of which included



releasing Mr. A. Superintendent Girard said that the grievor could have done the following:

- denied Mr. A entry and permitted him to return to the United States;
- issued him a temporary residency permit, if the conditions required for one were satisfied; or
- prepared a report under s. 36(2)(d) of the *IRPA*, which would have referred the matter to the Minister's delegate, who would have made a determination (at that time, with respect to the Beaver Creek POE, the delegate was Superintendent Girard).

**70** Superintendent Girard stated that the set fine for smuggling the handguns was \$2000 and that the grievor did not have the authority to reduce it to \$1000.

**71** By letter dated September 22, 2009, Superintendent Girard imposed a three-shift (25.71-hour) suspension as discipline for misconduct related to the actions the grievor took with respect to processing Mr. A and Mrs. A on August 4, 2009. The relevant portions of the letter are as follows:

...

*On August 4, 2009 you were working alone at the Port of Beaver Creek when a [5 ton] moving truck arrived at the Port of Entry. You conducted primary questioning on the sole male occupant of the vehicle (a United States Citizen) and his spouse who was in a separate vehicle that followed. After questioning, you determined that you had sufficient indicators that they both had undeclared firearms and directed them to secondary. You called the RCMP and another Border Services Officer for assistance. The RCMP Officer arrived and the male subject confessed to him that there were two firearms in the back of the [5 ton]. The RCMP Officer advised you of this and you arrested the male subject. You noted in your narrative that the male subject was emotionally upset.*

*You and your colleague proceeded to the [5 ton] with the subject, who was under arrest, and requested that he show where the firearms were hidden. The subject informed that*

*they were somewhere in the middle of the [5 ton]. You and your colleague directed the subject to unpack and locate the firearms. You told the subject that once the firearms were located, he was to inform you or your colleague to retrieve it. You and your colleague then proceeded to the office.*

...

*In review of the circumstances surrounding your conduct on August 4, 2009, I have found that you committed the following violations of the Enforcement Manual: Failure to contact management to inform of the arrest; Failure to arrest/detain or frisk the subject's spouse, as she was complicit in the crime; Allowing the subjects to search their own vehicle for undeclared firearms, a high-risk commodity; Failure to ensure that control was maintained over the firearms, conveyance, and all persons involved; Failure to notify the male subject of his Vienna Convention rights at the time of arrest.*

*I further find that you acted counter to the Immigration of Refugee Protection Act (IRPA), as you failed to address the immigration inadmissibility of the subjects. In addition, you elected not to complete the E67 against instructions previously emailed to you by your Chief.*

...

*Your failure to adhere to the Enforcement Manual, IRPA and management's direction constitutes negligence and a violation of the Values and Ethics Code for the Public Service. Under the Code, you are required to observe established Employer rules and procedures. Your actions in this matter were careless and taken without regard to security, and safety of others. I note, as you failed to perform a search of the vehicle and the spouse, there are no means to confirm whether there were additional undeclared firearms.*

*In making my decision regarding discipline in this matter, I have taken into consideration all mitigating factors, including your length of service, your clean disciplinary record and your cooperation with the investigation. I have also taken into account that we have previously discussed the requirement for you to maintain and apply a proficient level of knowledge of Acts, Regulations, and Policies, and that during the pre-disciplinary meeting you minimized the importance of your actions.*

*In order to impress upon you the seriousness with which management views your actions in these matters, you will be suspended from your duties without pay for a period of 3 shifts of 8.57 hours (25.71 hours). . . .*

. . .

[Sic throughout]

**72** Superintendent Girard testified that it was her decision to impose the discipline, based on her review of the facts and her discussions with her supervisor and with the Labour Relations branch. She said that she was concerned about the grievor's actions, in that she had done the following:

- she had left Mr. A alone with the care and control of the two vehicles;
- she had left Mrs. A with Mr. A and the vehicles;
- she could not possibly have constantly watched Mr. and Mrs. A while they were in and around the vehicles;
- she arrested Mr. A but should have removed him from the scene, but instead, she allowed him to access the vehicles;
- she had no way of knowing what if any other contraband might have been in the vehicles;
- she had no way of knowing what if any other contraband Mr. or Mrs. A might have removed from the vehicles; and
- she had no way of stopping Mr. A from using the firearms had he chosen to.

**73** Despite not being involved in any way with respect to this incident or the discipline that arose from it, Chief Ruitenbeek was asked a series of questions by the grievor's representative about what assistance he would have given if he ". . . had been returning through the POE and a BSO, with two years of experience, advised him that they had seized multiple guns and put a US citizen under arrest?" Initially, he stated that

he was not sure, as there were a number of variables. Later, he stated that initially, he would speak to the BSO but that he would let the BSO deal with it. He stated he would offer a physical presence as backup and would ask if the BSO needed anything.

**74** When the grievor's representative asked Chief Ruitenbeek if he would have reminded the BSOs about the *Vienna Convention*, he stated that his expectation was that they would have known of it. When the grievor's representative asked him if he would have remained present, he said that had his shift finished, he would have left. He pointed out that this type of event occurs daily at the CBSA (meaning smuggling or attempting to smuggle). When the grievor's representative asked him if he would have communicated with the senior officer if two officers were present, his reply was that he might have done so.

**B. The December 16, 2009, incident (file no. 566-02-5826)**

**75** The *Non-smokers' Health Act* (R.S.C., 1985, c. 15 (4<sup>th</sup> Supp.)), addresses smoking in certain federal public sector workplaces. Its s. 3(1) states that the employer and any person acting on its behalf shall ensure that persons refrain from smoking in any workspace under the control of the employer.

**76** The definition section of that Act defines the following terms:

- “employer”, which includes the TB;
- “smoke”, which means to smoke, hold, or otherwise have control over an ignited tobacco product or to vape using a vaping product; and
- “work space”, which means any indoor or other enclosed space in which employees perform the duties of their employment and includes any adjacent corridor, lobby, stairwell, elevator, cafeteria, washroom, or other common area frequented by such employees during the course of their employment.

**77** Section 4(1) of that Act states that no person shall smoke in any workspace under the control of an employer except in a designated smoking room or

area.

**78** The CBSA's "Code of Conduct" is a set of values and rules that its employees are expected to follow. Standard of conduct "e", which is entitled, "Consumption of Intoxicants and Smoking", states that employees are not permitted to smoke on duty unless they are on a rest period, and they are not permitted to smoke in any building in which the CBSA conducts its business.

**79** On December 16, 2009, the grievor smoked while on duty inside the POE building, adjacent to the PIL window. She stated that it had been very cold outside; she had the PIL window open and blew the smoke outside. She admitted that she had smoked and apologized.

**80** On April 3, 2009, Superintendent Girard had warned the grievor about smoking inside a CBSA vehicle. She testified that the grievor apologized for that incident.

**81** In December of 2009, Ms. Girard was on authorized leave, and Superintendent Ruitenbeek was acting in her absence. By letter dated January 12, 2010, Superintendent Ruitenbeek issued the grievor a 4-shift (34.28-hour) disciplinary suspension. The relevant portion of the letter states as follows:

...

*In making my decision regarding discipline in this matter, I have taken into consideration all mitigating factors, including that you took responsibility for your actions and showed some remorse. I have also taken into account that you were counselled by Superintendent Girard on April 3, 2009 in respect to the same issue; smoking in the workplace, as well as the fact that you have a previous three shift suspension for disciplinary reasons already on file.*

...

**82** Superintendent Ruitenbeek testified that the grievor admitted to smoking in the building, apologized, and said she would not do it again. He said that he made the decision to suspend her for four shifts (34.28 hours) and that he determined it was

appropriate based on the facts presented to him, including that she had recently received a three-shift (25.71-hour) suspension with respect to the August 4, 2009, incident.

## **II. Summary of the arguments**

### **A. For the employer**

**83** The employer's position is that the grievor committed misconduct on August 4 and December 16, 2009, and that the discipline that it imposed on her for that misconduct was appropriate.

#### **1. The August 4, 2009, incident**

**84** The grievor failed to follow established procedures and acted in a manner that can be considered misconduct. The employer referred me to *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37, *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 53, and *Hazlett v. Treasury Board (Solicitor General - Correctional Service of Canada)*, PSSRB File Nos. 166-02-19656 and 19657, (19901120), [1990] C.P.S.S.R.B. No. 199 (QL).

**85** The undisputed evidence was that Mr. A, a United States citizen, attempted to enter Canada without reporting restricted firearms in his vehicle, which is prohibited by s. 136(1) of the *Customs Tariff*, s. 35(1) of the *Firearms Act*, s. 159 of the *Customs Act*, and s. 103(1)(a) of the *CCC* and that the employer had grounds to discipline the grievor because she carelessly processed Mr. A under the *Customs Act* and the *IRPA*, specifically by failing to do the following:

- perform a proper search of the vehicle;
- control the firearms by allowing Mr. A, while under arrest, to retrieve the firearms, which was contrary to paragraphs 30, 40, 47, 75, 99, 109, 110, and 111 of the *Customs Enforcement Manual*, Part 4, Chapter 3;
- address Mr. A's inadmissibility into Canada under the *IRPA* and the *IRP Regulations* as set out in chapters 3.13 and 3.14 of the *Immigration*

Enforcement Manual, 2/OP 18, by failing to use the options available under that Act and regulations to address the inadmissibility, namely, issuing a temporary resident permit, allowing the traveller to withdraw his application to enter Canada, or preparing a report pursuant to s. 44(1) of the *IRPA* as set out and explained in sections 8.3, 8.4, 8.5, 12.1, 12.2, 12.3, 15, and 18.5 of that manual;

- complete a form E-67, contrary to paragraph 41 of the Customs Enforcement Manual;
- notify Mr. A of his right to have his consulate notified of his arrest as well as his right to consult with a consular official, which is contrary to article 36 of the *Vienna Convention*, as set out in paragraphs 39, 40, 92, 93, and 94 of the CBSA Enforcement Manual, Part 6, Chapter 1, and chapter 17.3 of the Immigration Enforcement Manual, 7 Investigations and Arrests; and
- inform management of Mr. A's arrest in a timely fashion, contrary to paragraphs 19 and 71(c) of the CBSA Enforcement Manual, Part 6, Chapter 1 and paragraph 109 of the Customs Enforcement Manual, Part 4, Chapter 3.

**86** As set out in *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, the determination of an appropriate disciplinary measure is an art, not a science. The onus is on the grievor to persuade the Board that the disciplinary penalty imposed was clearly unreasonable or wrong; otherwise, the Board must refrain from tinkering with it, even if it feels that a slightly less-severe penalty might have been sufficient.

**87** *Philps v. Canada Revenue Agency*, 2016 PSLREB 110, stands for the proposition that the fact that an act of misconduct, among many others, has been withdrawn or has not been demonstrated does not automatically lead to a reduction of the quantum of a disciplinary penalty. The Board must still assess whether the disciplinary penalty imposed was clearly unreasonable or wrong in light of the proven residual acts of misconduct.

**88** The employer submits that the three-shift suspension was reasonable and that the following are the aggravating factors that underlie that reasonableness:

- the seriousness of the misconduct;
- the BSOs are peace officers and are held to a higher standard because of the position of trust that they occupy;
- the CBSA places a substantial amount of trust in its BSOs to facilitate the legitimate flow of people and goods into the country;
- the risk to the health and safety of the grievor, her colleague, and the public;
- the grievor works alone, unsupervised;
- she had already been counselled about the need to be proficient in procedures;
- she attempted to minimize her conduct;
- she failed to accept any responsibility for her misconduct until the completion of her cross-examination during her evidence;
- she attempted to avoid responsibility for her actions by suggesting that she did not receive training in these matters;
- she attempted to blame her supervisor, who had driven through the POE on the day in question; and
- she has had a lengthy career, which brings with it a higher level of expectations.

**89** The employer submits that any mitigating factors are not sufficient to justify substituting a lesser penalty. This matter is analogous to a number of other decisions in which the Board or its predecessors upheld greater disciplinary measures



for the careless performance of duties. In this respect, the employer referred me to *Eden, Labadie, and Hazlett*.

## **2. The December 16, 2009, incident**

**90** The employer can discipline its employees for smoking in the workplace. The grievor's action amounted to a breach of the CBSA Code of Conduct and the *Non-smokers' Health Act*.

**91** The employer's position is that the discipline imposed in December of 2009 was progressive in that it followed the discipline imposed for the August 4, 2009, incident and was imposed after the grievor had already been warned about smoking in the workplace.

**92** According to the principle of progressive discipline, the employer is justified in escalating the sanctions it imposes on an employee for successive disciplinary infractions. It is well established that it is not a requirement that discipline progress by preordained steps.

**93** The employer submits that the following are the aggravating factors that underlie the reasonableness of the four-shift suspension imposed on the grievor:

- the seriousness of the misconduct;
- the BSOs are peace officers and are held to a higher standard because of the position of trust that they occupy;
- the CBSA places a substantial amount of trust in its BSOs to facilitate the legitimate flow of people and goods into the country;
- the risk to the health and safety of the grievor, her colleague, and the public;
- the grievor works alone, unsupervised;

- she was in uniform;
- the misconduct occurred at a service delivery point;
- the grievor's disciplinary record (the three-shift suspension for the August 4, 2009, incident);
- smoking in the workplace constitutes an open challenge to the employer; and
- the grievor has had a lengthy career, which brings with it a higher level of expectations.

**94** The employer submits that any mitigating factors are not sufficient to justify substituting a lesser penalty and that this matter is analogous to a number of other decisions in which the Board or its predecessors upheld greater discipline for smoking in the workplace.

**95** In this respect, the employer referred me to *Camco Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 504*, [1999] O.L.A.A. No. 806 (QL), *Flowserve Canada Corp. v. International Assn. of Machinists and Aerospace Workers, Local Lodge 1673*, [2009] O.L.A.A. No. 134 (QL), *Canadian Union of Postal Workers v. Canada Post Corporation*, [1993] C.L.A.D. No. 821 (QL), *Nova Scotia (Department of Transportation and Public Works) v. Canadian Union of Public Employees, Local 1867*, [1999] N.S.L.A.A. No. 22 (QL), *Saskatchewan Wheat Pool v. Transportation Communications International Union, Lodge 650*, [1997] C.L.A.D. No. 404 (QL), *Cooper, McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53, *Mangatal v. Deputy Head (Department of Natural Resources)*, 2016 PSLREB 43, *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88, and *Hazlett*.

## **B. For the grievor**

**96** At the time the discipline was imposed, the grievor had a 22-year discipline-free career.

**1. The August 4, 2009, incident**

**97** The discipline arose out of the incident in which the foreign traveller was arrested, fined, and then released.

**98** When it imposed the discipline of the three-shift suspension, the employer relied on eight violations, one of which was withdrawn — the failure to arrest and detain Mrs. A.

**99** A second ground, the failure to fill out a form E-67, was based upon a prior instruction by the Chief, of which the grievor was unaware. It was not in fact an instruction but a suggestion. This was not misconduct. The grievor had testified that the practice had been not to fill out a form E-67 if the primary and the secondary inspection officers were the same person. On a balance of probabilities, the employer has not proved that the grievor was aware of the change to the practice suggested by Chief Rathberger.

**100** This leaves only six alleged violations, a number of which arose from a single event.

**101** A third alleged violation was failing to inform management of arresting Mr. A. Superintendent Armstrong's evidence was that on August 4, 2009, when Superintendent Girard was passing through the POE while returning to Canada sometime between 5:00 p.m. and 7:00 p.m. and while she was in her vehicle and he was in the PIL booth, he advised her that they (the BSOs) had confiscated two smuggled weapons and had arrested someone. In addition, later that evening, the grievor sent a flash report to management with respect to the arrest and to the seizure of weapons, as per policy. At the very least, management was informed once if not twice of the arrest and seizure.

**102** The remaining five alleged violations all arose from the same fact scenario. On August 4, 2009, Mr. and Mrs. A were travelling from Alaska to one of the lower 48 states in two vehicles, the first being the 5-ton packed with all their household goods.

**103** Dealing with the contents of the truck took five hours.

**104** With respect to the fact that the grievor did not alert Mr. A of his *Vienna Convention* rights, the employer alleges that this was more than one violation; one violation was the failure to notify him, which breached the *Vienna Convention* but also breached the V&E Code. It is one action and the same set of facts.

**105** The grievor's training history was entered into evidence. She testified and it is her position that she lacked training in the area of immigration. In her PER, which is dated August 5, 2009, before she was aware she would be disciplined for what had occurred the day before, Superintendent Girard indicated that the grievor had noted to her a desire to improve her immigration knowledge.

**106** When the August 4, 2009, scenario was put to him, Superintendent Ruitenbeek testified that had he arrived on the scene as Superintendent Girard did, he would likely have entered the POE to see what assistance, if any, was needed. This was contrasted to Superintendent Girard who continued on her way home and did not stop to see if any assistance was needed. Given that Mr. and Mrs. A were still in the POE when Superintendent Girard passed through, her attendance could have provided necessary guidance with respect to at least a couple of the violations alleged by the employer, namely, the grievor's failure under the *Vienna Convention* and her failure to properly process Mr. A with respect to his entry into Canada.

**107** This leaves the grievor's misconduct, which was her failure to secure and maintain control of the 5-ton, which held the undeclared restricted weapons.

**108** In her evidence at the hearing, the grievor admitted that she would now act differently. She made an honest mistake when she allowed Mr. A to unpack the 5-ton. It was a difficult situation. Her actions were not intentional misconduct; she thought she was acting correctly.

**109** Mr. Armstrong was also disciplined, via a one-day suspension. Discipline is supposed to be corrective, not punitive.

**110** The August 4, 2009, situation was serious, and it could have been tragic, but it was not. The year 2009 was different from 2018; a three-shift suspension is punitive.

**111** The employer failed to consider the mitigating circumstances, which were the grievor's honesty, cooperation, and years of service.

**112** The grievor accepted that she did something wrong, albeit not intentionally.

**113** The grievor submits that given the circumstances, if a penalty was warranted, the appropriate one would be a one-shift suspension, which is the same as the penalty imposed on BSO Armstrong.

**114** The grievor referred me to *Pugh v. Deputy Head (Department of National Defence)*, 2013 PSLRB 123, and *Gatien v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 101.

## **2. The December 16, 2009, incident**

**115** The only issue is the quantum of the discipline. The grievor acknowledged smoking in the employer's premises. She apologized and expressed remorse.

**116** The grievor submits that the four-shift suspension was too severe and that it should be reduced.

### **C. The employer's reply**

**117** The evidence disclosed that the grievor had been trained in both immigration and in screening travellers.

**118** The evidence was crystal clear — the grievor did not acknowledge any wrongdoing until her cross-examination.

**119** The jurisprudence does not require *mens rea* (criminal intent) for misconduct. Performing duties carelessly is sufficient to establish misconduct.

**120** A three-shift suspension is appropriate discipline for an incident involving weapons and public safety.

### **III. Reasons**

**121** Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo* (new hearings), and the burden of proof is on the respondent. Any issues with respect to the investigation of the facts that led to disciplining the grievor were remedied by the hearing *de novo* before me.

**122** The usual basis for adjudicating discipline issues involves considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 (QL)): Was there misconduct by the grievor? If so, was the discipline the employer imposed an appropriate penalty in the circumstances? If not, what alternate penalty is just and equitable in the circumstances?

#### **A. The August 4, 2009, incident**

**123** The employer disciplined the grievor by suspending her for three shifts for her actions in processing Mr. and Mrs. A at the Beaver Creek POE. At the outset of the hearing, the employer stated that it was withdrawing one of the grounds of misconduct, related to the grievor's failure to arrest, detain, or frisk Mrs. A. This left the following acts by the grievor, which the employer maintains warranted disciplining her:

- allowing Mr. A and Mrs. A to unload and search the 5-ton and locate the firearms;
- failing to contact management to inform it of the arrest;
- failing to maintain control over the firearms and the 5-ton;
- failing to maintain control over Mr. and Mrs. A;
- failing to inform Mr. A of his *Vienna Convention* rights;

- failing to fill out the E-67 form; and
- failing to address Mr. A's admissibility into Canada after his arrest.

**124** The basis for the discipline for the August 4, 2009, incident can be broken down into the following two generic themes:

- (i) searching Mr. and Mrs. A's possessions and confiscating the firearms; and
- (ii) the administrative processing with respect to the arrest and detention of Mr. A.

**125** As of the August 4, 2009, incident, the grievor had 22 years of experience as either a customs inspector or a BSO. While there may be several different Acts and related regulations, as well as policies and procedures related to the BSO position, simply put, a BSO's duties at a POE involve addressing the admissibility of persons and goods into the country.

### **1. Searching Mr. and Mrs. A's possessions and confiscating the firearms**

**126** It is clear that the grievor was well aware that attempting to bring firearms into the country without declaring them was a criminal offence because, upon Mr. A's admission that he had firearms, she arrested him. At this point, the grievor, who was suspicious of the traveller's actions, alerted the RCMP. In addition, she contacted BSO Armstrong and requested his assistance at the POE so that the POE could continue to process travellers while she dealt with the situation involving Mr. and Mrs. A.

**127** After the arrest, the grievor's actions became problematic. While her initial action was determining that Mr. A and possibly Mrs. A were not being truthful about possessing firearms, she then ignored other salient facts and potential serious risks not only to her but also to Cst. Bedard, BSO Armstrong, Mr. and Mrs. A and their son, and the other people lined up at the POE.

**128** Both Mr. A and Mrs. A lied to the grievor about possessing firearms. While

it is possible that Mrs. A did not know that Mr. A had the two firearms in the 5-ton, it had certainly been in the grievor's mind that Mrs. A did know, as the grievor stated so in her testimony. Nevertheless, the grievor left Mrs. A outside with the two vehicles, one that the grievor knew had firearms in it, and the other, containing Mrs. A, which also could well have contained firearms.

**129** After Mr. A was arrested, Mrs. A remained in her vehicle. When the grievor left to get Mrs. A and the couple's son, she left Mr. A in the POE building lobby. He had already had an emotional breakdown of some type, as the grievor testified that he became upset and stated that he had screwed up and would lose his new job. Despite this, it does not appear that he was restrained in any way. When she exited to get Mrs. A, the grievor left Mr. A either unattended or with Cst. Bedard.

**130** Despite suspecting that Mr. and Mrs. A were lying about the firearms and that the firearms in the 5-ton could have been owned by either of them, the grievor chose not to search the vehicle Mrs. A was in, despite knowing that Mr. and Mrs. A were travelling together as a family with their son and that Ms. A was driving the family vehicle.

**131** The grievor testified that while this was going on, other travellers were arriving at the POE and were lining up, seeking entry into the country. BSO Armstrong was called in to assist, showed up, and started to clear the backed-up traffic. Yet, despite BSO Armstrong being available to handle the traffic, the grievor determined that she was going to allow both Mr. and Mrs. A to unload the 5-ton themselves to locate the firearms.

**132** It was clear from the evidence that Mr. and Mrs. A could not be seen the entire time they did the unloading. They were outside, away from the building in what would have been the commercial lane. By then, Cst. Bedard had departed the POE, and BSO Armstrong was carrying out PIL duties. While the grievor did say that she checked on Mr. and Mrs. A, she was doing other things, including paperwork. Mr. and Mrs. A could have done the following:

- disposed of the firearms;



- produced only one of the firearms and disposed of the other;
- brought more firearms into Canada since they could have had more than two and could have produced only the two that they did produce;
- brought other contraband into the country;
- driven off, either into Canada or back into the United States; or
- used the firearms.

**133** As of this incident, the grievor was hardly new to the job; in fact, it was quite the opposite. She had worked as either a customs inspector or a BSO for 22 years. In her evidence, she testified that she had worked for a year before being sent for training at the CBSA's National Training Centre in Rigaud, Quebec. She stated that during that first year, she worked for a month in Whitehorse and then at a Yukon-Alaska POE. She said that after finishing her training in Rigaud, she returned to western Canada and worked at border crossings in B.C. and the Yukon.

**134** From the evidence, it appears that once the grievor viewed the 5-ton, which was packed with all of Mr. and Mrs. A's goods and had two firearms buried in it somewhere, she simply did not want to search it. There was no reason she could not have carried out the search as BSO Armstrong was present to handle traffic. The CBSA Enforcement Manual, Part 2, Enforcement Priorities, Chapter 3, deals with firearms and weapons. It sets out that it is an offence under the *Customs Act*, the *CCC*, and the *Customs Tariff* to smuggle or attempt to smuggle any prohibited goods, including firearms.

**135** Under "Policy Guidelines", at paragraph 23 of the CBSA Enforcement Manual, Part 2, Enforcement Priorities, Chapter 3, it states as follows: "Firearms and weapons are high-risk commodities and their interdiction is therefore a CBSA enforcement priority."

**136** Paragraph 45 of that same chapter states in part as follows:

45. CBSA officers [BSOs] are responsible for:

...

b) *observing, targeting, selecting, and examining conveyances, baggage, goods and commercial shipments for firearms and weapons . . .*

c) *detecting and intercepting prescribed materials or devices, such as explosives or firearms and prevent their importation into or transit through Canada;*

...

k) *collecting and submitting information and evidence for prosecution and providing it to investigations/police.*

**137** The Customs Enforcement Manual, Part 4, Examination - Goods and Conveyances, Chapter 3, Personal Baggage, Goods, and Conveyance Examination Policy and Procedures, states that it is the CBSA's policy to physically examine personal baggage, conveyances (vehicles), and goods upon arrival to and departure from Canada when deemed necessary and that all examinations will be done in a thorough, methodical, and proficient manner. It goes on to state that when conducting examinations, BSOs will take measures to protect the health and safety of fellow officers, the public, and themselves.

**138** That section of the manual also states that persons will be allowed to view the examinations of their baggage and conveyance but that they will be kept at a safe distance to avoid any intentional or incidental interference.

**139** Finally, that section states that BSOs will conduct systematic and intensive examinations of personal baggage, conveyances (vehicles), and goods when they are the subject of a lookout or target or if there are reasonable grounds to suspect that a contravention is occurring, based on a number of indicators.

**140** Superintendent Girard stated that the CBSA and Immigration Enforcement Manuals were available on the CBSA intranet, which was accessible at the Beaver Creek POE. She also stated that all the information with respect to searching for and confiscating contraband, including weapons, is covered in the training at Rigaud and

that updates and changes to it are emailed to employees.

**141** The grievor had the requisite knowledge to determine that Mr. and Mrs. A were not being truthful, to call Cst. Bedard and BSO Armstrong for assistance, and to arrest Mr. A for attempting to smuggle firearms into the country. I do not believe that with her years of experience, she could not possibly have known that it was inappropriate to allow someone to search his own vehicle for firearms who has just been arrested for smuggling them and who lied and became upset that his actions might have caused him to lose the job he was moving to start. Quite frankly, at a bare minimum, it defies not only logic but also common sense.

**142** If there was any question as to what the grievor should have done, she could simply have restrained Mr. and Mrs. A and then either consulted the available manuals or contacted Superintendent Girard (via landline, cell phone, or satellite phone, depending on her location) or the on-duty superintendent in Whitehorse.

**143** The grievor also pointed to the fact that Superintendent Girard passed through the POE on that day at approximately 5:00 p.m., at which point BSO Armstrong briefed her about the situation. She suggested that the issues that led to the discipline would have been ameliorated had Superintendent Girard entered the POE to see if she and BSO Armstrong needed assistance.

**144** As stated earlier, the CBSA's business and the BSOs' work at all POEs is to determine the admissibility of people and goods into the country. The BSOs do this day in, day out; in short, it is their business. Nothing in the evidence of the exchange between BSO Armstrong and Superintendent Girard indicated that the grievor and BSO Armstrong needed any help with respect to Mr. and Mrs. A; nor was any indication made that a process was ongoing.

**145** While much was made of the 5-ton and the other family vehicle still being parked at the POE when Superintendent Girard went to the PIL, whether she saw it or not is irrelevant, as BSO Armstrong did not point out that those were the vehicles involved in the arrest and seizure; they could have been anyone's vehicles.

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**2. The administrative processing with respect to Mr. A's arrest and detention**

**146** Once the grievor arrested Mr. A, she was required to address the arrest and his inadmissibility into the country. The evidence disclosed that she had three options for dealing with it, none of which she chose, and none of which included just releasing him to proceed on his way.

**147** As with the rules on searching travellers and their possessions (including their vehicles), the rules on the admissibility of people, especially those who have been arrested, are clearly spelled out in the CBSA and immigration enforcement manuals. As stated, these materials were available on the CBSA's intranet at the Beaver Creek POE. If the grievor had any question as to what to do, she could simply have consulted the available manuals or contacted Superintendent Girard (via landline, cell phone, or satellite phone, depending on her location) or the on-duty superintendent in Whitehorse.

**148** The grievor submitted that she lacked training in immigration issues and that just before the incident, as part of her performance appraisal process, she had requested further training in that area. While this is laudable, it is difficult to comprehend that with all her years of experience, she would not have come across an inadmissibility issue.

**149** As set out earlier, BSOs at POEs deal with two things: the admissibility of people and goods into the country. They either are allowed in, or not.

**150** The fact that the grievor had all those years of experience suggests strongly that at some point, she would have come across an admissibility issue involving a foreign national. Even if not, the nature of her job dictated that once she arrested Mr. A, she had to follow a process, and the information on that process could have been found somewhere. She certainly had the requisite knowledge to know that she should have done something, and she simply chose not to look for the information.

**151** The grievor maintained she was unaware of the *Vienna Convention*. It is clearly spelled out in the Immigration Enforcement Manual. People entering Canada are either Canadian citizens or they are not Canadian citizens. The *Vienna Convention*

addresses additional rights for people who are not Canadian citizens. Both Superintendents Girard and Ruitenbeek referred to it, and both are aware of it. I find it difficult to believe that with all her years of experience as either a customs inspector or a BSO at POEs, the grievor has never heard of the *Vienna Convention*.

### **3. The failure to fill out the E-67 form**

**152** One of the reasons the employer set out as a ground for the discipline was the grievor's failure to complete the E-67 form, when she decided to pull over Mr. and Mrs. A for secondary searching. I fully understand the reason and purpose of the E-67 form. Anyone who has entered the country through a POE, be it a land crossing with the United States or through one of our busy international airports, can appreciate that coded information passed from the PIL officer to the secondary officer is relevant not only in pointing the secondary officer to the matters at issue but also as evidence.

**153** However, in the circumstances of this incident, it is also not difficult to see why the grievor did not fill out the form; she was both the PIL and the secondary officer. She did not need to provide coded information to another officer as she had the knowledge. All that said, I do not see the failure to fill out the E-67 form in these circumstances, in and of itself, as warranting discipline. That being the case, the grievor's actions with respect to the search and admissibility issues were serious enough such that I am not influenced to reduce the penalty.

### **4. The failure to report the arrest to management**

**154** Another reason the employer set out as a ground for the discipline was the grievor's failure to inform management of the arrest of a traveller. She did alert it to the arrest, albeit in a not-so-timely manner. Based on the evidence, the arrest took place sometime between 1:20 p.m. and 1:55 p.m. Notice of the details of the arrest was sent to management via a flash report at 9:24 p.m., which was sent not only to management but also to others at the CBSA. However, when Superintendent Girard transited through the POE at around 5:00 p.m., BSO Armstrong did convey to her that an arrest had been made and that a weapons seizure had taken place, although no details or specifics with respect to the arrest were provided until the flash report was issued.

**155** Again, I do not put a lot of weight on this ground with respect to the discipline rendered, and like the failure to fill out the E-67 form, I do not see it as justification for reducing the amount of the discipline.

**B. The December 16, 2009, incident**

**156** There is no issue that this misconduct, smoking in the Beaver Creek POE building, occurred. The grievor admitted to it. The only question for me to answer is if the discipline imposed, a four-shift suspension, was appropriate in the circumstances.

**157** In assessing the discipline to impose, Superintendent Ruitenbeek stated that while the grievor had not previously been disciplined for smoking in the building, Superintendent Girard had warned her earlier that year on April 3 that smoking was prohibited in CBSA vehicles. He also considered that she had recently been given a three-shift suspension for the August 4, 2009, incident.

**158** At first glance, it would appear that a four-shift (34.28-hour) suspension for an isolated incident of smoking a cigarette inside a building is severe. As the grievor's representative stated, discipline is supposed to be corrective.

**159** I agree with the submission of the grievor's representative that discipline should be corrective. Not smoking inside the Beaver Creek POE is a simple, straightforward rule. It has been a rule in federal workplaces since the late 1980s, when the *Non-smokers' Health Act* came into force. I have no doubt that the grievor was aware of the rule as she has been employed as a federal public servant in some capacity since 1987. Indeed, Superintendent Girard had spoken to her earlier in 2009 about smoking in a CBSA vehicle.

**160** However, I find that the character of the misconduct with respect to smoking is no different from the character of the misconduct with respect to the failure to search Mr. and Mrs. A's vehicles, in that the grievor knew the rule and simply chose not to follow it. It is clear that she did not learn from her recent three-shift suspension. As such, I do not view the four-shift suspension as disproportionate in the circumstances such as to warrant reducing it.

**161** For all of the above reasons, the Board makes the following order:

**IV. Order**

**162**           The grievance in file no. 566-02-5824 is dismissed.

**163**           The grievance in file no. 566-02-5826 is dismissed.

January 9, 2019.

**John G. Jaworski,  
a panel of the Federal Public Sector  
Labour Relations and Employment  
Board**